

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION**

**SCOTTSDALE INSURANCE
COMPANY**

Plaintiff,

v.

COLONY INSURANCE COMPANY

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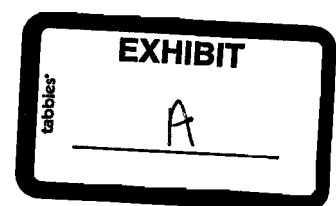
CIVIL ACTION NO. 7:10-CV-83

**INDEX OF PLEADINGS FILED IN 398th JUDICIAL DISTRICT COURT
OF HIDALGO COUNTY, TEXAS**

Date Filed

1. Plaintiff's Original Petition and citation

03/19/2010



Attorney Name: Nelson, Michael F.
Attorney Email: mnelson@bbarr.com
Bar Number: 14904625
Law Firm: Burt Barr & Associates, L.L.P.
Address: P.O. Box 223667
City/State/Zip: Dallas, TX 75222
Phone Number: 214-943-0012
Fax Number: 214-943-0048
Filer Name: Nelson, Michael F.
Filer ID: mnelson1
Filer Email: mnelson@bbarr.com
Filer Type: Attorney
Filing Type and Fee Changes Allowed? Yes

New Filing

Filing Information[View All Participants](#)

Filing Status: Acknowledgement - Open
Filer Submission Date/Time: Friday, March 19, 2010 2:09 PM
Trace Number: ED108J015710647
Court Assignment:
Hearing Date:
Court Type: District
Case/Cause Number:
Style/Case Name: Scottsdale Insurance Company v. Colony Insurance Company
Filing Type: Civil Suit (No Service)
Sealed Document: No
Special Instructions:

Please charge any additional fees associated with the filing and service of process to the provided card.

Comments to the Filer:

Respondents

Name: Commissioner of Insurance for the State of Texas
Delivery Method: Service of Citation by Sheriff
Service Comments:
Address: 333 Guadalupe
Austin, TX 78701

Payment Information

Payment Method: Credit Card - MasterCard, Account # *****7784

Filing Fees

Civil Suit (No Service) \$222.00
Filing Fee Total: \$222.00

Misc. Fees

Citation \$8.00
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Misc. Fee Total: \$44.00

Service Fees

Service of Citation by Sheriff

\$60.00

Service Fee Total: \$60.00

Grand Total: \$326.00

ORIGINAL
Filed
10 March 19 P2:09
Laura Hinojosa
District Clerk
Hidalgo District
mbms

CAUSE NO. C-832-10-I

SCOTTSDALE INSURANCE
COMPANY,

Plaintiff,

VS.

COLONY INSURANCE COMPANY

Defendant.

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IN THE DISTRICT COURT OF

HIDALGO COUNTY

298th

JUDICIAL DISTRICT

ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Scottsdale Insurance Company (Scottsdale) brings its original petition against Colony Insurance Company (Colony), and would show:

Discovery in this action should be controlled by Level 2.

This Court has jurisdiction over the parties and the claims. Venue lies in Hidalgo County under CPRC § 15.002(a)(1).

Scottsdale is authorized to do business in the State of Texas as is defendant Colony Insurance Company (Colony).

Colony has not designated an attorney for service with the Texas Department of Insurance. Colony can be served by serving the Commissioner of Insurance for the State of Texas.

Scottsdale seeks contribution and subrogation from Colony. Scottsdale and

Colony insured Chicho's Welding and Erectors (Chicho). Chicho was a third-party defendant in a construction defect based action: Cause No. C-2974-07-I, in the 398th Judicial District Court of Hidalgo County, Texas, styled *Woodcrafters Home Products, LLC. v. McAllen Steel Erectors, Inc. v. Chicho's Welding & Erectors* (the "Lawsuit"). Scottsdale seeks affirmative relief for loss adjustment expenses incurred in defending claims in the Lawsuit.

Scottsdale and Chicho entered into a general liability insurance contract numbered CLS1481996 (CLS Policy), for the period 8/22/06 to 8/22/07. Colony issued a general liability insurance to Chicho for the policy periods 8/22/04 to 8/22/05.

Woodcrafters hired McAllen Steel to install a roof on a metal building. McAllen Steel hired Chicho as a subcontractor for the installation of the roof. The installed roof leaked. Woodcrafters brought the Lawsuit against McAllen Steel and Chicho for construction defects. McAllen Steel brought a third-party action against Chicho for contribution. Woodcrafters' allegations included claims for negligence, breach of contract, and breach of warranty. Woodcrafters alleged that its damages occurred in 2005 through 2007.

Scottsdale afforded a defense to Chicho for Woodcrafter's claims and McAllen Steel's third-party claims. Although defense of Woodcrafter's claims and McAllen

Steel's third-party claims against Chicho were tendered to Colony, Colony refused to afford a defense. Scottsdale paid monies for Chicho's incurred defense costs, which were satisfied by insurance proceeds.

Colony had a duty to defend Chicho under the policy of insurance it issued to Chicho. That duty was triggered by the petition and third-party petition in the Lawsuit and Chicho's tender of the defense of those claims to Colony. The live pleadings in Woodcrafter's petition and McAllen Steel's third-party petition contained allegations that stated facts which would support a cause of action within the coverage of Colony's policy issued to Chicho. Woodcrafters and McAllen Steel have alleged claims against Chicho for which Colony may be obligated to pay.

CONTRIBUTION

The Scottsdale policy provides in SECTION IV- CONDITIONS 4.c.:

Method of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributing equal amounts until it has paid its applicable limit of insurance or none of the *loss* remains, whichever comes first.

If any other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers. (Emphasis added)

The method of sharing only applies to *loss* (indemnity), not defense. Accordingly, Scottsdale did not contractually agree to pay only its pro rate share of defense costs. Scottsdale and Colony had a common obligation to pay defense costs incurred by Chicho in defending claims that fall within the coverage of Colony's policy issued to Chicho. This common obligation creates a right of contribution in Scottsdale.

Scottsdale has paid more than its fair share of the defense costs. Scottsdale has paid defense costs incurred by Chicho in the Lawsuit, and thus, has the right to recover the excess amount of defense costs paid by them, from Colony, which violated its duty to defend the common insured, Chicho.

Colony and Scottsdale shared a common obligation to afford a defense to Chicho for the Lawsuit. Scottsdale has made a compulsory payment or other discharge of more than its fair share of this common obligation.

The obligation to pay defense costs is equally and concurrently due by Colony and Scottsdale. Scottsdale is entitled to recover those defense costs to be shared by the policy of insurance issued by Colony to Chicho. Colony had an obligation to pay its share of the defense costs incurred by Chicho in the Lawsuit, for which Scottsdale seeks recovery.

INSURANCE CODE VIOLATIONS

Scottsdale is a person as defined by Texas Insurance Code § 541.002(2).

Colony is a person as defined by Texas Insurance Code § 541.002.

Colony violated § 541.060(a)(5) by refusing to pay an applicable first-party claim (defense costs) on the basis that coverage from other carriers was available. The Colony policy did not specifically provide for such a coverage interpretation.

Colony also violated Chapter 541 by failing to pay a valid claim (defense costs) without conducting a reasonable investigation and by making a misrepresentation of the benefits afforded by its policy.

Colony's act or practice was a producing cause of damage to Scottsdale. Scottsdale also seeks recovery of its attorney's fees under § 541.152(a)(1) of the Texas Insurance Code.

Scottsdale requests a trial by jury.

Pursuant to Rule 194, you are requested to disclose, within 50 days of service of this request, the information or materials described in Rule 194.2.

PRAYER

WHEREFORE, Scottsdale respectfully requests:

A. That this Court award Scottsdale reimbursement of attorney's fees and loss adjustment expenses incurred in defending Chicho in the Lawsuit, which should

have been paid by Colony;

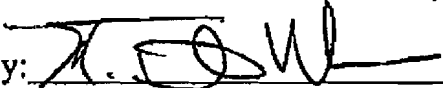
B. That the Court award Scottsdale its attorney's fees incurred in this action, through appeal, under the Texas Insurance Code;

C. That the Court award Scottsdale its costs, prejudgment interest, and postjudgment interest, as allowed by applicable law; and

D. That the Court grant Scottsdale such other and further relief as it may deem just and proper.

Respectfully submitted,

BURT BARR & ASSOCIATES, L.L.P.

By: 

M. FOREST NELSON

State Bar No. 14904625

203 E. Colorado Blvd

Dallas, Texas 75203

(214) 943-0012

Telefax: (214) 943-0048

ATTORNEYS FOR SCOTTSDALE
INSURANCE COMPANY

C-832-10-I
DISTRICT COURT, HIDALGO COUNTY, TEXAS 398 JUDICIAL DISTRICT
OF TEXAS

CITATION

SCOTTSDALE INSURANCE COMPANY

vs.

COLONY INSURANCE COMPANY

NOTICE TO DEFENDANT: You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty (20) days after you were served this citation and petition, a default judgment may be taken against you.

To: COLONY INSURANCE COMPANY

TEXAS DEPARTMENT OF INSURANCE

COMMISSIONER OF INSURANCE FOR THE STATE OF TEXAS

333 GUADALUPE

AUSTIN, TX 78701

You are hereby commanded to appear by filing a written answer to the ORIGINAL PETITION at or before 10:00 o'clock a.m. on the Monday next after the expiration of twenty (20) days after the date of service hereof, before the Honorable 398 Judicial District Court of Hidalgo County, Texas at the Courthouse, 100 North Closner, Edinburg, Texas 78539.

Said Petition was filed on the 19th of March, 2010 and a copy of same accompanies this citation. The file number and style of said suit being No. C-832-10-I

SCOTTSDALE INSURANCE COMPANY

vs.

COLONY INSURANCE COMPANY

Said Petition was filed in said Court by NELSON, M. FOREST whose address is 203 E. COLORADO BLVD., DALLAS, TX 75203.

The nature of the demand is fully shown by a true and correct copy of the petition accompanying this citation and made a part hereof.

The officer executing this writ shall promptly serve the same according to requirements of law, and the mandates thereof, and make due return as the law directs.

Issued and Given under my hand and seal of said Court, at Edinburg, Texas this the 30th day of March, 2010

Laura Hinojosa, District Clerk
Hidalgo County, Texas

By: 

SONIA PONCE, DEPUTY CLERK

**CERTIFICATE OF RETURN
UNDER RULES 103 T.R.C.P.**

This is to certify that on the 30th day of March, 2010 I, SONIA PONCE DEPUTY CLERK of the 398th Judicial Court of Hidalgo County, Texas mailed to the defendant in cause number C-832-10-I, SCOTTSDALE INSURANCE COMPANY vs. COLONY INSURANCE COMPANY a copy of the citation along with a copy of the petition by certified mail return receipt requested that on the _____ day of _____, 2010 receipt was returned served on the _____ day of _____, 2010 (or unserved for the reason on the certificate return) _____

GIVEN UNDER MY HAND AND SEAL OF SAID COURT, at office in Edinburg Texas this the _____ day of _____, 2010

LAURA HINOJOSA, DISTRICT CLERK
HIDALGO COUNTY, TEXAS

BY: _____

U.S. Postal Service	
CERTIFIED MAIL RECEIPT	
<i>(Domestic Mail Only: No Insurance Coverage Provided)</i>	
For delivery information visit our website at www.usps.com	
OFFICIAL USE	
Postage	\$ _____
Certified Fee	_____
Return Receipt Fee (Endorsement Required)	_____
Restricted Delivery Fee (Endorsement Required)	_____
Total Postage & Fees	\$ _____
Postmark Here	
Sent To: <u>Colony Insurance Company</u> Street, Apt. No., or P.O. Box No.: <u>353 Guadalupe</u> City, State, ZIP+4: <u>Muskin, TX 78701</u>	

7009 2250 0004 2440 9325

PS Form 3800, August 2005

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<p>1. Article Addressed to:</p> <p>Calony Insurance Company Texas Department of Insurance Commissioner of Insurance for the State of Texas 233 Guadalupe Austin TX 78701 C-832-10-I</p>		<p>A. Signature <input checked="" type="checkbox"/> Agent <input type="checkbox"/></p> <p>B. Received by (Printed Name) <input type="checkbox"/> Address <input type="checkbox"/></p> <p>C. Date of Delivery <input type="checkbox"/></p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If YES, enter delivery address below:</p>	
<p>2. Article Number (Transfer from service label)</p> <p>7009 2250 0004 2440 9325</p>		<p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Registered Mail <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/></p> <p><input type="checkbox"/> Registered <input type="checkbox"/> Insured Mail <input type="checkbox"/> G.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes <input type="checkbox"/> No</p>	
PS Form 3811, February 2004		102595-02-M-1540	

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Hidalgo County

District Clerk

P.O. Box 87

Edinburg, TX 78540

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Apr 06 2010 ^{ca}

P.O. Box 87

